BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CONNIE L. MILLER	)	
Claimant	)	
	)	
VS.	)	
	)	
PROGRESSIVE HOME HEALTHCARE	)	
Respondent	)	Docket No. 1,021,798
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 25, 2006 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on December 20, 2006.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 47 percent work disability based upon a 31 percent task loss and a 63 percent wage loss.

The respondent requests review of the nature and extent of claimant's disability. Respondent argues the claimant failed to accept respondent's accommodated job offers in which she could have earned at least 90 percent of her pre-injury wage and therefore she should only be entitled to her functional impairment.

Conversely, claimant argues the proposed accommodated job did not return her to 90 percent of her pre-injury wage and it was not economically feasible to continue such work. Consequently, claimant argues she is entitled to at least a 50 percent work disability.

The sole issue for Board determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant, an LPN, was employed as a private duty nurse for special needs children. She performed her work at the patient's home. On October 19, 2004, she fell and hit her back on an oxygen tank. Ultimately, Dr. Pollock was authorized to provide medical treatment. Claimant received epidural steroid injections as well as physical therapy. Claimant was off work until September 26, 2005, when she was determined to be at maximum medical improvement and released with restrictions.

When claimant was released from medical treatment her lifting restrictions prevented a return to the job she had been performing for respondent. Claimant tried working at a nursing home and only lasted one day as she had difficulty being on her feet the entire eight-hour shift. However, she then submitted applications at five or six other nursing homes.

The respondent offered accommodated work by sending claimant to homes where she was not required to lift. She then returned to work on weekends for respondent. She was paid a flat rate of $25 for a Medicare visit and an incremental rate per 15 minutes of $11, $16, or $21 if it was a Medicaid visit.

Betty Harmon, human resources director for respondent, explained that claimant was an LPN who performed pediatric shift work for respondent before her injury. Shift work was described as performing the entire work day at one location whereas in home visits required travel to multiple locations during the work day. After claimant's injury Ms. Harmon called claimant on February 15, 2006, and offered her accommodated work performing home health care visits. The proposed work involved doing in home visits to provide diabetic care and wound care and each visit would last from 15 to 45 minutes. On February 20, 2006, Ms. Harmon and claimant met to discuss the proposed work and the amount of compensation paid for each visit. Claimant was to be paid a flat rate of $25 for a Medicare visit and an incremental rate per 15 minutes of $11, $16, or $21 if it was a Medicaid visit. The more home visits claimant took the more wages she would earn.

Claimant agreed to perform some visits starting the weekend on February 25 and 26, 2006. Respondent offered claimant more visits in order to get her wages back to her pre-injury average gross weekly wage. But claimant declined working the following weekend because she had bronchitis. More work was offered the next weekend but claimant again declined because she had not recovered from the bronchitis. Claimant accepted some visits on March 18 and 19 but refused two because she felt they were too far to drive. Claimant never returned a call regarding working the last weekend in March. On April 8 and 9 claimant accepted a few visits but again turned down some that she felt were too far to drive.

In April there were discussions with claimant about taking over a full-time nurse's position during week days for a nurse that was resigning and claimant said she would think about it. But claimant never responded and those patients were assigned to other nurses.

Respondent continued to offer claimant visits and she would sporadically accept work some weekends and not accept for other weekends due to a variety of reasons. She also continued to refuse some visits because of the distance to travel. On May 1, 2006, claimant called to inquire if full time work was available and was told there were visits available from a sick nurse. Claimant again said she would think about it. Claimant continued to refuse to take some offered visits. As an example claimant earned $132 the first week in April but refused work that would have made an additional $386.

Ms. Harmon noted that respondent has nurses earning from seven to nine hundred a week if performing visits during the week. And it was anticipated claimant would start performing visits during the week and weekends as well if she wanted. During the month of May claimant worked the first weekend in May and then declined the second weekend because she wanted off for mother's day. Finally, when respondent called about scheduling claimant the weekend of May 20 and 21 claimant declined work saying she had received her disability and did not have to work for respondent anymore.

Dr. Chris D. Fevurly saw claimant at the request of respondent's attorney on October 7, 2005. Dr. Fevurly performed an examination of claimant and diagnosed claimant with chronic low back pain consistent with a contusion sprain/strain for the October 2004 fall. Claimant also has asthma, emphysema, obesity and diabetes. Based upon the AMA *Guides*[1], the doctor concluded claimant had a 10 percent functional impairment but that 5 percent was preexisting. The doctor imposed permanent restrictions of lifting 25 pounds on an occasional basis with frequent lifting limited to 10 pounds. Claimant should avoid repetitive or prolonged bending and stooping and she should be allowed to alternate between sitting and standing as needed. The doctor concluded that claimant's biggest disabling factor was her pulmonary condition and her overall

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

deconditioning. He noted claimant could only walk a small distance before she became short of breath.

Dr. Fevurly reviewed the list of claimant's former work tasks prepared by Ms Terrill and concluded claimant could no longer perform 9 of the 39 tasks. But Ms. Terrill later testified that one task should be removed which reduced her task list to 38 tasks. Consequently, Dr. Fevurly concluded claimant could no longer perform 9 of 38 tasks for a 24 percent task loss. Dr. Fevurly reviewed the list of claimant's former work tasks prepared by Mr. Hardin and concluded claimant could no longer perform 10 of the 29 tasks for a 34 percent task loss.

Dr. Pedro Murati examined claimant on November 10, 2005, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with low back pain secondary to symptomatic degenerative disk disease with signs and symptoms of radiculopathy; a preexisting compression fracture at L1 with fusion; and, diabetes. Based upon the AMA *Guides*, the doctor concluded claimant had a 10 percent whole person functional impairment. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no crawling or lift/carry/push/pull greater than 15 pounds and that only occasionally. Claimant should rarely bend, crouch and stoop. She should occasionally sit, stand, walk, climb stairs or ladders, squat or drive. She should limit frequent push/pull to 5 pounds and alternate sitting, standing and walking.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Hardin and concluded claimant could no longer perform 11 of the 29 tasks for a 38 percent task loss. Dr. Murati reviewed the list of claimant's former work tasks prepared by Ms Terrill and concluded claimant could no longer perform 16 of the 38 tasks for a 42 percent task loss.

Karen Terrill, a vocational rehabilitation counselor, conducted a personal interview with claimant on May 8, 2006, at the request of respondent's attorney. She prepared a task list of 38 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, the claimant was still working for respondent averaging 8 to 12 home visits a week at $11 per visit. Ms. Terrill thought claimant capable of working as a unit or work clerk in a medical facility or as a dispatcher for fire, police or ambulance services because of her medical background. Claimant was not looking for work. Ms. Terrill opined claimant was capable of earning from $10.34 to $15.20 an hour or between $413.60 and $608 a week. On cross-examination, it was noted that claimant's average weekly wage while performing her accommodated job was $234. Finally, Ms. Terrill noted that a home health nurse obtains an increase in wages by increasing the number of home visits that they make.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on December 23, 2005, at the request of claimant's attorney. He prepared a task list of 29 nonduplicative tasks claimant performed in the 15-year period before her injury.

Although Mr. Hardin opined claimant could no longer perform CNA or LPN nursing duties he agreed claimant could still perform the home visits respondent had arranged after her injury. Mr. Hardin further opined claimant has the capability to be a records clerk or a receptionist in a medical office earning $7.50 an hour. Mr. Hardin concluded claimant was capable of earning from $300 to $320 per week.

Claimant has sustained a low back injury. Consequently, claimant's permanent disability compensation is governed by K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that the post-injury wage should be based upon the worker's retained ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

And the Kansas Court of Appeals in *Watson*[5] held that failing to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

After claimant was released from medical care the record indicates she obtained work at a nursing home but lasted one day, she then applied for work at several other nursing homes. But this was the extent of her efforts to obtain employment for a five month period and cannot be said to exhibit a good faith effort to find employment. Claimant then attempted the accommodated work offered by respondent. On some occasions claimant had legitimate reasons, such as illness, for not working and on other occasions her efforts were suspect. However, the offered accommodated in-home visits required extensive travel whereas her pre-injury work was performed at one location for her entire work day. But upon qualifying for social security disability the claimant ceased her employment efforts.

The Board concludes claimant has failed to prove that she made a good faith effort to find appropriate employment especially after she ceased looking for employment after she apparently began receiving social security disability. However, the medical and vocational evidence in the record is overwhelming that claimant's low back injury does not prevent her from working. In short, claimant retained the ability to work but did not seek employment other than the sporadic effort she made to perform the home health care visits for respondent. Consequently, a post-injury wage should be imputed.

Although there is testimony in the record that indicates that if enough home health care visits were performed the claimant could eventually earn wages equal to or greater than her pre-injury average gross weekly wage, nonetheless, her actual wages while she

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[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[6] *Id.* at Syl. ¶ 4.

was attempting such visits were much less than her pre-injury average gross weekly wage. When Ms. Terrill interviewed claimant she noted that claimant's average weekly wage while performing her accommodated job with respondent was $234. And it is speculative to conclude what earnings claimant might have achieved if provided home health care visits during the week especially since she had only worked week-ends and not during the week for the three months she was provided accommodated work. Moreover, if claimant accepted more visits she would be required to travel greater distances and spend more time sitting in the car driving. Extended captive sitting in the car would violate Dr. Fevurly's restriction that she alternate sitting and standing and Dr. Murati's restriction that she only occasionally sit, stand or drive. Therefore, the Board concludes it would be improper to impute a wage based upon speculation that claimant could potentially earn as much or more than her pre-injury average weekly wage.

Mr. Hardin concluded claimant was capable of earning up to $320 per week. Based upon the medical evidence and claimant's restrictions, the Board finds Mr. Hardin's opinion more persuasive than Ms. Terrill's opinions regarding claimant's wage earning ability. The Board finds that claimant is able to earn $320 per week. Comparing $320 per week to claimant's stipulated pre-injury wage of $546.22 yields a 41 percent wage loss.

The other prong of the permanent partial general disability formula is the loss of work tasks. As indicated above, Dr. Murati reviewed Mr. Hardin's task list and determined claimant had a 38 percent task loss and Dr. Fevurly reviewed Ms. Terrill's list and concluded claimant had a 24 percent task loss. The ALJ averaged those two opinions for a 31 percent task loss. This finding was not disputed by the parties at oral argument. The Board is not persuaded that either percentage is more accurate than the others. Consequently, the Board likewise averages those percentages and concludes that claimant sustained a 31 percent task loss due to her work-related injury.

Averaging the 31 percent task loss with the 41 percent wage loss yields a 36 percent work disability. The Board finds claimant's whole person functional impairment is 7.5 percent, which is an average of Dr. Fevurly's 5 percent rating and Dr. Murati's 10 percent rating. Consequently, claimant is entitled to receive benefits for a 36 percent permanent partial general disability under K.S.A. 44-510e(a).

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated September 25, 2006, is modified to award claimant permanent partial disability benefits for a 36 percent work disability.

The claimant is entitled to 38.71 weeks temporary total disability compensation at the rate of $364.16 per week or $14,096.63 followed by 140.86 weeks of permanent partial disability compensation at the rate of $364.16 per week or $51,295.58 for a 36 percent work disability, making a total award of $65,392.21.

As of March 30, 2007, there would be due and owing to the claimant 38.71 weeks of temporary total disability compensation at the rate of $364.16 per week in the sum of $14,096.63 plus 88.72 weeks of permanent partial disability compensation at the rate of $364.16 per week in the sum of $32,308.28 for a total due and owing of $46,404.91, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $18,987.30 shall be paid at the rate of $364.16 per week for 52.14 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this 30th day of March 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING & DISSENTING OPINION

The undersigned Board Member agrees with the majority's findings and conclusions except for its determination that claimant could not return to work with respondent and earn

90 percent of her pre-injury average weekly wage. The majority finds that in order for claimant to make a sufficient number of contacts to earn $491.60 (90% of $546.22) per week, she would have to drive in excess of her restrictions. This Board Member disagrees. The type of work claimant performed working for respondent afforded her considerable flexibility. She could spread her contacts out during the day and over all 7 days of the week. In addition, she could schedule the in-home visits in a way that would allow her time to stop and get out of her car whenever necessary to avoid prolonged sitting and driving. Accordingly, I would find claimant did not make a good faith effort to perform the work offered by respondent. Had she done so, she would have been able to average earnings of at least 90 percent of her pre-injury average weekly wage. As such, K.S.A. 44-510e(a) as interpreted and applied by our appellate courts, precludes an award of work disability. Instead, claimant's permanent partial disability compensation should be limited to her percentage of functional impairment.

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge